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Dana Corporation *and* Clarice K. Atherholt, Petitioner and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO

Metaldyne Corporation (Metaldyne Sintered Products) *and* Alan P. Krug and Jeffrey A. Sample, Petitioners and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. Cases 8–RD–1976, 6–RD–1518, and 6–RD–1519

June 7, 2004

ORDER GRANTING REVIEW

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND MEISBURG

The Petitioners' Requests for Review of the Regional Directors' administrative dismissals of the instant petitions are granted as they raise substantial issues regarding whether the Employers' voluntary recognition of the Union bars a decertification petition for a reasonable period of time under the circumstances of these cases. The Petitioners' motion to consolidate Cases 8–RD–1976, 6–RD–1518, and 6–RD–1519 is also granted, as is the Petitioners' motion requesting that the Board solicit amicus briefs on the issues raised in these cases.

In granting review, we emphasize that we have made no judgments about the ultimate merits.

We acknowledge current precedent. But that precedent is based upon a union's obtaining signed authorization cards from a majority of the unit employees before entering into the agreement with an employer, while in both of the instant cases, an agreement was reached between the union and the employer *before* authorization cards, evidencing the majority status, were obtained. In addition, we believe that changing conditions in the labor relations environment can sometimes warrant a renewed scrutiny of extant doctrine. As our colleagues acknowledge, the change here is that the use of voluntary recognition has grown in recent years. Although no party here challenges the legality of voluntary recognition, the fact remains that the secret-ballot election remains the best method for determining whether employees desire union representation.[1] In such an election, employees cast a secret vote under laboratory conditions and under the supervision of a Board agent. By contrast, a card-signing guarantees none of these protections. The issue raised herein is the extent to which, if any, a voluntary recognition should be given election "bar quality." The issue is significant because "bar quality" means that, for some period, the employees will not be able to exercise their Section 7 right to reject the union and/or choose a different one.

The *Kroger*[2] principle, cited by our colleagues, is wide of the mark. The issue in that case is whether an employer violates Section 8(a)(5) if it *dishonors* an agreement to recognize a union upon acquisition of majority status. The instant cases present a far different issue. The Employers have *honored* the agreement and have recognized the Union. The issue is whether that recognition should operate as a bar to decertification petitions filed by employees who were not parties to that agreement.

Neither *MGM*,[3] nor *Seattle Mariners*, 335 NLRB 563 (2001), cited by our colleagues, deals with the issue presented here. Both cases *assume* the very proposition that is at issue here, viz., whether voluntary recognition of the kind involved herein should give rise to a recognition bar. More specifically, *MGM*, supra, *assumes* the recognition bar principle, and then deals with the issue of whether a reasonable period of time had elapsed after the voluntary recognition. *Seattle Mariners*, supra, also assumes the recognition bar principle, and then deals with the issue of whether a 30-percent antiunion petition at the time of recognition would preclude the recognition from being used as a bar. Thus, neither case raises the threshold issue of whether the recognition should be a bar in the first place where, as here, it follows a card-check agreement that was entered into when the union had no majority support.

Our colleagues, citing the Board's Rules and Regulations, Section 102.67(c), say that there are no compelling reasons for a grant of review. Fortunately, the section sets forth what a "compelling reason" can be. One of them is "a need for reconsideration of an important rule or policy." Precisely that situation exists here.

In sum, we believe that the increased usage of recognition agreements, the varying contexts in which a recognition agreement can be reached, the superiority of Board supervised secret-ballot elections, and the importance of Section 7 rights of employees, are all factors which warrant a critical look at the issues raised herein. At this point, the only difference between our colleagues and

[1] *Linden Lumber v. NLRB*, 419 U.S. 301 (1974).

[2] *Kroger Co.*, 219 NLRB 388 (1975).

[3] *MGM Grand Hotel*, 329 NLRB 464 (1999).

ourselves is that we believe the time is appropriate to take that critical look and they do not.

Dated, Washington, D.C. June 7, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS LIEBMAN and WALSH, dissenting.

Voluntary recognition—and with it a temporary bar against raising representation questions before the Board, after recognition—have long been "a favored element of national labor policy." *NLRB v. Lyon & Ryan Ford*, 647 F.2d 745, 750 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981). In recent years, American labor unions have had increasing success in organizing employees by winning voluntary recognition from employers.[1] Success, it seems, has prompted greater scrutiny. Today, inexplicably, our colleagues have cast a cloud over voluntary recognition, by granting review in this case. Decades of Board and court precedent supporting voluntary recognition are now called into question, and unions, employers, and employees are left in doubt, as the Board contemplates a radical change in the law. Because we believe that the grant of review is unsupported—and, indeed, highly questionable—we dissent.[2]

I. BACKGROUND

Each of the consolidated cases involves a decertification petition filed just weeks after the Employer voluntarily recognized the Union based on a card check conducted by a neutral third party.

In September 2002, Metaldyne Corporation and the Union entered into a neutrality and card-check agreement. The Union then began an organizing drive and solicited authorization cards from employees in an agreed-upon unit of production and maintenance employees. On November 26, 2003, the Union notified Metaldyne that it had the support of a majority of the unit employees. On December 1, 2003, after a card check by a neutral third party, the Employer voluntarily recognized the Union as the exclusive bargaining representative of the unit. Only 3 weeks later, on December 23, 2003, the Petitioner filed a petition for a decertification election. The petition was supported by a showing of interest obtained after the grant of recognition.

On August 6, 2003, Dana Corporation and the Union also entered into a neutrality and card-check agreement, and the Union began soliciting authorization cards. About November 26, 2003, the Union notified Dana that it had the support of a majority of employees in the agreed-upon unit. On December 4, 2003, after a card check by a neutral third party, Dana voluntarily recognized the Union. On January 7, 2004, the Petitioner filed a petition for decertification election, again supported by a showing of interest obtained after the grant of recognition.

In both cases, the Regional Director dismissed the petition. The Regional Director invoked the Board's long-established recognition bar doctrine, which provides that voluntary recognition of a union in good faith based on demonstrated majority status will bar a petition for a reasonable period of time. See *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966); *Sound Contractors Assn.*, 162 NLRB 364 (1966). The Regional Director found that a reasonable time had not elapsed since recognition.

The Petitioner in each case filed a request for review, arguing that the Board should completely abolish the voluntary recognition bar, or, alternatively, modify it to allow decertification petitions to proceed if they are filed within the first 30 or 45 days after recognition.

The Regional Director properly dismissed the petition pursuant to well-settled law. Review should be denied.

II. VOLUNTARY RECOGNITION IS A FUNDAMENTAL ELEMENT OF NATIONAL LABOR POLICY: THE RECOGNITION BAR DOCTRINE IS WELL SETTLED AND SOUND

The overriding policy of the Act is "industrial peace." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 38 (1987); *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). "The [NLRA] is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401 (1952). To that end, the Board "seeks to balance the competing goals of effectuating free choice while promoting voluntary recognition and protecting the stability of collective-bargaining relationships." *Ford Center for the Performing Arts*, 328 NLRB 1 (1999).

Consistent with those policies, it is beyond dispute that a union need not be certified as the winner of a Board election in order to become the exclusive bargaining representative. See *NLRB v. Gissel Packing Co.*, 395 U.S.

[1] See, e.g., David Wessel, *"Some Workers Gain with New Union Tactics,"* Wall Street Journal (Jan. 31, 2002).

[2] We join our colleagues only in granting the Petitioners' request that the Board solicit amicus briefs.

575, 596 (1969). Instead, an employer may voluntarily recognize a union that has demonstrated majority support by other means, including—as in the present cases—signed authorization cards from a majority of the unit employees.[3] The Board and courts have uniformly endorsed voluntary recognition**.** See *NLRB v. Lyon & Ryan Ford, Inc.*, supra; *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978); *Terracon, Inc.*, 339 NLRB No. 35, slip op. at 5 (2003), affd. 361 F.3d 395 (7th Cir. 2004) (noting the Board's "established objective of promoting voluntary recognition"); *MGM Grand Hotel*, 329 NLRB 464**,** 466 (1999) ("It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations.").

In keeping with the policy favoring voluntary recognition, the Board held in 1966 that when an employer voluntarily recognizes a union in good faith based on a demonstrated showing of majority support, the parties are permitted a reasonable time to bargain without challenge to the union's majority status. See *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966). The Board stated:

> With respect to the present dispute which involves a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that . . . the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining. Such negotiations can succeed, however, and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time.

Id. See also *Sound Contractors Assn.*, 162 NLRB 364 (1966) (holding that rule of *Keller Plastics* applies in representation cases). Consistent with the Act's policy to effectuate employee free choice, the voluntary recognition bar extends only for a reasonable period, not in perpetuity. *MGM Grand*, supra at 467. If a reasonable time elapses and the parties have not yet reached agreement, the presumption of the union's majority status becomes rebuttable, and a decertification petition is no longer barred.

The recognition bar doctrine is consistent with the long-settled principle that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. . . . After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944).

In the years since *Keller Plastics*, supra, the Board has continually reaffirmed the recognition bar doctrine. See, e.g., *Seattle Mariners*, 335 NLRB 563, 564 (2001); *MGM Grand*, supra at 465–466; *Ford Center for the Performing Arts*, supra; *Rockwell International Corp.*, 220 NLRB 1262, 1263 (1975). Furthermore, the appellate courts have repeatedly endorsed the principle that a union that is voluntarily recognized based on a showing of majority support enjoys an irrebuttable presumption of majority status for a reasonable time after recognition. See, e.g., *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243 (D.C. Cir. 1994); *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383–1384 (2d Cir. 1973); *NLRB v. Frick Co.*, 423 F.2d 1327, 1332 (3d Cir. 1970); *NLRB v. San Clemente Publishing Corp.*, 408 F.2d 367, 368 (9th Cir. 1969); *NLRB v. Montgomery Ward & Co.*, 399 F.2d at 411–413; *NLRB v. Universal Gear Service Corp.*, 394 F.2d 396, 397–398 (6th Cir. 1968).

In an attempt to distinguish the present case from prior decisions applying the recognition bar, our colleagues rely on the fact that the Employers and the Union entered into the card-check agreement before the Union obtained signed authorization cards from a majority of the unit employees. Our colleagues state that Board precedent is "based upon" a union's obtaining signed cards from a majority of unit employees *before* entering into an agreement that the employer will voluntarily recognize the union upon proof of majority status. That is not the case.

First, the Board has applied the recognition bar in cases like the present one, in which the employer and union agree in advance—before the union obtains majority support—that the parties will use a card check by a neutral third party as a means of determining majority support for the union, and that the employer will voluntarily recognize the union if the card check shows majority support. See *Seattle Mariners*, supra; *MGM Grand*, supra.

Second, although in some prior decisions the union did in fact obtain authorization cards from a majority of the

[3] See *Retail Clerks Local 455 v. NLRB*, 510 F.2d 802, 807 fn. 19 (D.C. Cir. 1975) (legislative history indicates that Congress intended to permit nonelection recognition procedures), on remand 219 NLRB 388 (1975); *Rockwell International Corp.*, 220 NLRB 1262, 1263 (1975) (employer's "choice of a card check was not only reasonable but one long accepted and sanctioned by the Board"); *NLRB v. Montgomery Ward & Co.*, 399 F.2d 409, 412–413 (7th Cir. 1968) (rejecting argument that card checks are too "informal and uncertain" a method of selection to warrant a recognition bar); *Snow & Sons*, 134 NLRB 709, 710 (1961) (employer bound by its agreement to honor the results of a card check), enfd. 308 F.2d 687 (9th Cir. 1962).

unit employees before entering into a card-check agreement with the employer, there is nothing in those decisions to indicate that that fact was critical to determining that the recognition bar should apply. See, e.g., *Rockwell International Corp.*, supra. Other decisions simply did not specifically address whether the union obtained majority support before or after the parties agreed to voluntary recognition contingent on proof of majority status. See, e.g., *Keller Plastics*, supra. Therefore, in such cases, the decision certainly did not turn on that issue.

Third, agreements in advance to recognize a union if it demonstrates majority support are hardly novel. The Board has long permitted "after-acquired stores" clauses in collective-bargaining agreements. Those clauses provide that the employer will recognize the union as the representative of employees in stores acquired after the execution of the agreement, and will apply the collective-bargaining agreement to those employees, upon proof that a majority of those employees support the union. See, e.g., *Kroger Co.*, 219 NLRB 388, 389 (1975). The Board stated in *Kroger*: "The Board has held that an employer may agree in advance of a card count to recognize a union on the basis of a card majority, and we can perceive of no reason why it may not contract with the union to do so in advance of the time the union has commenced organization." Id. (internal citation omitted). Therefore, our colleagues' attempt to draw a material distinction between the present case and well established Board precedent is unavailing.

The recognition bar is not only well-settled doctrine, but also necessary to effectuate the Act's policies of industrial peace and stability of labor-management relations. The beginning of a new relationship between a union and an employer is a time of uncertainty for all involved: the union, the employer, and the employees. Negotiating a first contract involves unique issues that are not necessarily present when the parties have a bargaining history. See, e.g., *N. J. MacDonald & Sons*, 155 NLRB 67, 71–72 (1965) (initial contracts "usually involve special problems, such as in the formation of contract language, which are not present if a bargaining relationship has been established over a period of years and one or more contracts have been previously executed"). The parties need the opportunity to learn how to deal with each other productively, and the employees need the opportunity to determine if the union can represent them effectively. The recognition bar allows the employees' chosen union to "concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and be decertified." *MGM Grand*, supra at 466; see also Brooks, supra at 100 (noting, in the context of a certification bar, that "[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out").

Thus, for nearly 40 years, the Board, with court approval, has applied the recognition bar doctrine as an appropriate balancing of the Board's goals to maintaining stability and industrial peace while protecting employee free choice. The Petitioners now seek to abolish that doctrine.

III. THE PETITIONERS OFFER NO COMPELLING REASONS FOR REVIEW

In granting review, our colleagues state that they have made no judgment on the ultimate merits of the recognition bar doctrine, but simply want to take a "critical look" at it. However, the Board will grant requests for review only when "compelling reasons" exist. The Board's Rules and Regulations, Section 102.67(c). As explained below, the Petitioners have offered no compelling reasons to justify a "critical look" at the recognition bar doctrine. Therefore, review should be denied.

The Petitioners contend that a secret-ballot election is the most reliable method of measuring employee support for a union and is, therefore, necessary to ensure free choice. The Petitioners, however, ignore the indisputable fact that the Act permits employees to choose a bargaining representative by means other than an election. Indeed, an employer's duty to bargain under Section 8(a)(5) of the Act is subject, not to Section 9(c), which deals with elections, but to Section 9(a),[4] whose operative words "designated or selected" mean more than just elections. And the Supreme Court has stated that "[a]lmost from the inception of the Act . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation . . . ." *Gissel*, supra at 596–597. As explained above, voluntary recognition of a majority union is not only permissible but encouraged.

The Petitioners also argue that employees may be "coerced" into signing authorization cards. However, as the Petitioners are forced to concede, the Act provides recourse for employees who believe their employer recognized a union that lacked uncoerced majority support. An employer's recognition of a minority union, even if done in good faith, violates Section 8(a)(2). The standard remedy for such a violation is to order the employer

[4] Sec. 9(a) states that a representative "designated or selected" by the majority of employees in a unit shall be the exclusive bargaining representative. The Act does not specify the manner in which the union must be chosen.

to cease and desist from recognizing and bargaining with the union until the union has been certified by the Board. See *Crest Containers Corp.*, 223 NLRB 739, 742 (1976).[5]

Thus, the Petitioners have failed to present compelling reasons to grant review. Indeed, the reasons *not* to do so are compelling. As explained above, voluntary recognition is "a favored element of national labor policy." *Lyon & Ryan Ford*, supra at 750. Abolishing the recognition bar would make voluntary recognition meaningless. Employers have no incentive to recognize a union if they know that recognition may be subject to immediate second-guessing through a decertification petition. In addition, abolishing the recognition bar would frustrate the Act's fundamental policies of furthering industrial peace and labor relations stability. If a decertification election is permitted immediately following recognition, assuming the union prevails, the election "nevertheless would have the deleterious consequence of 'disrupt[ing] the nascent relationship' between the employer and union pending the outcome of the election and any subsequent proceedings.'" *Seattle Mariners*, supra at 565 (citing *Smith's Food & Drug Centers*, 320 NLRB 844, 845–846 (1996)).

[5] In their requests for review, the Petitioners claim that the Employers held mandatory meetings in which employees, either explicitly or implicitly, were encouraged to support the Union. The Petitioners concede, however, that they filed no unfair labor practice charges regarding the Employer's recognition of the Union. Therefore, there have been no charges—let alone any complaint by the General Counsel or any determination by the Board—that the Employers violated Sec. 8(a)(2) by unlawfully assisting the Union or recognizing a union that lacked uncoerced majority support.

The Petitioners' alternative argument—that a petition should be allowed within a 30- or 45-day window after recognition—fares no better**.** Even if petitions are allowed only within the first weeks after recognition, the Employer's incentive for voluntary recognition is nevertheless destroyed. The Petitioners contend that a petition filed immediately after recognition will not have a destabilizing effect on labor relations, because bargaining will not even have begun. This argument ignores the very purpose of the recognition bar: to allow the parties time to establish their relationship and to bargain for an initial agreement.

Therefore, the Petitioners have failed to give any compelling reasons to abolish or modify the recognition bar.

IV. CONCLUSION

The issues raised by the Petitioners were settled 40 years ago. The recognition bar has stood the test of time. To revisit it serves no purpose but to undermine a principle that has been endorsed time and again by the Board and the courts. The Petitioners' Requests for Review should be denied.

Dated, Washington, D.C. June 7, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD